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FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-395
(Application No. 07A252)
CAPITAL CASE

In the
SUPREME COURT OF THE UNITED STATES

THOMAS D. ARTHUR,

Petitioner,

v.

RICHARD F. ALLEN, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF

TROY KING
Attorney General of Alabama

J. CLAYTON CRENSHAW*
Assistant Attorney General
*Counsel of Record**

OFFICE OF THE ATTORNEY GENERAL
STATE OF ALABAMA
11 South Union Street
Montgomery, Alabama 36130-0152
(334) 242-7300

Counsel for Respondents

RESPONDENT'S REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF

Thomas Arthur, presently set for execution on September 27, 2007, at 6:00 p.m., filed a supplement brief based on this Court's grant of certiorari in Baze v. Rees, 07-5439. Contrary to Arthur's assertions, this Court's grant of certiorari review in Baze v. Rees, 07-5439, does not necessitate the grant of a stay in Arthur's case. First, the certiorari grant in Baze is specifically constrained to cases where no execution is pending. The petitioner's questions presented actually note the absence of a scheduled execution date in that case. Second, the Baze case is unencumbered by any of the procedural hurdles present in Arthur's case. The Eleventh Circuit ruled that "[i]n considering the dismissal of a lethal injection challenge, courts are to apply equitable principles which mandate dismissal when the plaintiff 'delayed unnecessarily in bringing the claim, ... knowing full well that the discovery, evidentiary hearing, and decision on the merits that he demands could not possibly be accomplished' within the short period of time between filing and the scheduled execution date." Arthur, at A19 (quoting Rutherford v. McDonough, 466 F.3d 970 (11th Cir. 2006)(quoting Hill v. McDonough, __ U.S. __, 126 S. Ct. 2096, 2104 (2006). The Eleventh Circuit then held that the balance of the equities tips against Arthur because, among other things, "Arthur was on notice that a challenge to Alabama's method-of-execution was available under § 1983 as early as June 2006, as a result of the Supreme Court's decision in Hill, or August 2006, as a result of other filed Alabama actions." Arthur at A22-A23. Baze involved a direct challenge to the Kentucky protocol through the state courts, it was timely, and it was not filed with unjustifiable delay. Third, and most significantly, the issue on which the Court granted review in Baze appears to be related to the standard to be used when assessing method-of-execution claims on the merits. Conversely, that issue is not presented here because

Arthur did not make any evidentiary submission to the federal district court. Thus, the lower courts did not grapple with which standard to apply. Thus, Arthur's case falls outside the purview of the Court's grant of certiorari in Baze. Indeed, it is no different from any other late-filed challenge to an execution. It is dilatory and it does not justify the granting of a stay of execution.

Respectfully submitted,

TROY KING
Attorney General of Alabama

J. CLAYTON CRENSHAW*
Assistant Attorney General
*Counsel of Record**

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STATE OF ALABAMA
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(334) 242-7300

Counsel for Respondents